STATE OF MICHIGAN
IN THE SUPREME COURT

BEVERLY HEIKKILA, Personal Representative for the Estate of Sheri L. Williams,

Plaintiff-Appellee,

v

MARC ROLLAND SEVIGNY, J.R. PHILLIPS TRUCKING, LIMITED, a foreign corporation,

Defendants-Appellants,

and

NORTH STAR, INC., a Michigan corporation, and INTERNATIONAL MILL SERVICE, INC., a Michigan corporation, Jointly and Severally,

Defendants.
_____/

Supreme Court
Case No. _____

Court of Appeals
Case No. 246761

Monroe Circuit Court
Case No. 00-11135-NI

NOTICE OF HEARING

DEFENDANTS-APPELLANTS, MARC R. SEVIGNY AND J.R. PHILLIPS TRUCKING'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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STATEMENT OF ORDER APPEALED FROM

In this litigation, plaintiff-appellee, Beverly Heikkila, as Personal Representative of the estate of Sheri L. Williams, seeks to recover damages for the fatal injuries sustained by Sheri L. Williams on October 13, 1999, when she was struck by an unidentified object which came through her windshield. It was the plaintiff's theory that the object was "slag", and that the "slag" had been picked up by Marc Sevigny's truck while on the premises of defendants North Star and International Mill Service. Thus, plaintiff seeks to blame Sevigny and his employer for the accident. However, the trial court entered a summary disposition in favor of all defendants, including defendants-appellants, Marc Sevigny and J. R. Phillips Trucking, Ltd. [Opinion 11/20/02, attached hereto as Exhibit A.] In its opinion, the court concluded that the record did not contain evidence from which a reasonable trier of fact could conclude that the defendants' conduct proximately caused plaintiff's injury:

> In the case at bar, there lacks adequate evidence for a reasonable trier of fact to conclude Defendants proximately caused Plaintiff's injury. The object has never been discovered. Test results report the object was comprised of ubiquitous materials: iron and paint. Plaintiff's expert witnesses' testimony conclude and speculate with regard to their theories that proffer no basis in fact for the source of the object linked to Defendants' premises or actions. Plaintiff's allegations lack the requisite linkage. While Plaintiff's theory may be conceivably true, Michigan law does not permit a jury to speculate between a couple or more coequally supposable causes of injury.
>
> [Opinion 11/20/02, pp 5-6]

Moreover, the summary disposition granted to defendants Sevigny and J. R. Phillips was also premised on the trial court's conclusion that defendants had owed

plaintiff "no duty to complete multiple tire inspections due to the unforeseeable nature of the unfortunate event." [Opinion 11/20/02, p 8] It also granted defendants' motion in limine, excluding the expert testimony of plaintiff's proffered experts because they lacked "the requisite evidentiary basis for want of specialized, scientific knowledge removing the testimony from the ambit of speculation." [Opinion 11/20/02, p 8]

On December 7, 2004, the Michigan Court of Appeals released its opinions in which a majority of the Court reversed the grant of summary disposition, while affirming the trial court's exclusion of expert testimony which had been offered in support of plaintiff's theory that the object that went through the Williams' vehicle was "slag" that had been picked up by Marc Sevigny's vehicle while on that portion North Star's property that was leased to International Mill Service.[1] The lead opinion concluded that plaintiff's theory was more than conjecture and speculation, but rendered no opinion on the question of duty applicable to defendants Sevigny and J. R. Phillips, stating that the resolution of this issue depended on unresolved factual issues concerning the condition of the premises owned and controlled by co-defendants, North Star Trucking and International Mill Service. In dissent, Judge Kelly would have, *inter alia*, affirmed summary disposition in favor of Sevigny and J. R. Phillips because there was no genuine issue of material fact that these defendants owed plaintiff's decedent a duty that was arguably breached.

Defendants-Appellants, Marc Sevigny and J. R. Phillips, herein seek leave to appeal from the erroneous ruling of the Court of Appeals.

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[1] Those opinions are attached hereto as Exhibit B.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE CIRCUIT COURT PROPERLY CONCLUDE THAT MARC SEVIGNY OWED NO DUTY TO PLAINTIFF TO CONDUCT MULTIPLE INSPECTIONS OF HIS TIRES BEFORE LEAVING THE PREMISES OF NORTH STAR STEEL?

Plaintiff-Appellee says: "No".

Defendants-Appellants say: "Yes".

The Court of Appeals did not resolve the question.

The circuit court said: "Yes".

II. WHERE PLAINTIFF SOUGHT TO IMPOSE LIABILITY ON DEFENDANTS MARC SEVIGNY AND J.R. PHILLIPS TRUCKING, PREMISED ON A THEORY THAT SLAG EMBEDDED BETWEEN THE TIRES OF SEVIGNY'S TRUCK HAD DISLODGED AND WAS PROPELLED INTO PLAINTIFF'S WINDSHIELD, WAS SUMMARY DISPOSITION PROPERLY GRANTED TO DEFENDANTS WHERE, *INTER ALIA,* THERE WAS NO EVIDENCE THAT ANY OBJECT HAD ACTUALLY BEEN EMBEDDED BETWEEN THE TIRES, AND WHERE THERE WAS NO EVIDENCE THAT THE OBJECT THAT WENT THROUGH PLAINTIFF'S WINDSHIELD WAS SLAG, AND WHERE THERE WAS NO EVIDENCE THAT ANY EXTRA INSPECTIONS WOULD HAVE AVOIDED THIS ACCIDENT?

Plaintiff-Appellee says: "No."

Defendants-Appellants say: "Yes."

The Court of Appeals said: "No."

The circuit court said: "Yes".

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

This litigation was commenced in the Monroe County Circuit Court on May 17, 2000, by plaintiff-appellee, Beverly Heikkila, Personal Representative of the Estate of Sheri L. Williams, seeking to recover damages for injuries sustained by Sheri L. Williams on October 13, 1999, when she was fatally injured when an object came through her front windshield while Ms. Williams was driving her car eastbound on East Front Street in Monroe, Michigan, in the vicinity of property owned by defendant, North Star Steel. Theorizing that the object that went through the windshield was "slag" that had been picked up by the tires of the truck driven by defendant-appellant, Marc Sevigny, while on North Star's property, and more particularly on that portion of the property leased to defendant-appellant, International Mill Service, plaintiff sought to impose liability for these injuries on defendants North Star Steel, International Mill Service, Marc Sevigny, and Sevigny's employer, defendant-appellant, J.R. Phillips, Ltd.

The record of this case, including the deposition testimony attached as exhibits to the briefs filed below, disclose the following pertinent facts:

On October 13, 1999, defendant-appellant, Marc Sevigny, was a truck driver employed by defendant-appellant, J.R. Phillips, Ltd., a Canadian company. Sevigny had entered the United States in order to pick up a load of slag at International Mill Service, on the premises of North Star Steel.[2] Dean Rioux, another truck driver employed by J.R. Phillips, testified that he drove down to IMS with Sevigny on October 13, and that they

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[2] Richard Hahey, the superintendent of International Mill Service, testified that IMS reclaims steel. (Hahey, p 6)

loaded up together. (Rioux, pp 23, 25) Sevigny was driving a truck with two trailers – a lead trailer, followed by a pup. (Sevigny, p 44) Each of the trailers had a "lift axle", which can be, and are, raised at times when the trailers are loaded. (Sevigny, p 69) Rioux testified that the lift axles are up after loading and weighing, while exiting the property, and during many turns, in order to avoid chewing up the tires or popping the rims. (Rioux, p 102)[3] The lift axle on the lead trailer was the "fourth axle", and the lift axle on the pup trailer was the "eighth axle". (Sevigny, p 69)[4] Sevigny explained the events that occurred after he had loaded up with the slag: After being weighed, it was determined that his truck was too heavy, so he backed up to a slag pile and dumped some of the slag he had loaded. He then inspected his vehicle, noted an object lodged in his fourth lift axle, and removed the object. After being reweighed, he did a "circle" inspection of his vehicle, and left the premises. (Sevigny, pp 31-34)[5]

Mr. Sevigny detailed the visual check that he had accomplished before leaving the scale area of IMS, which included looking between each set of tires, looking back and forward, and top and down, and kicking the tires with his steel toed boots. (Sevigny, pp

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[3] Paul Chapp, a Motor Carrier Officer with the Michigan State Police, also testified concerning the use of lift axles. (Chapp, 73-74)

[4] Some confusion in the record exists as a result of Ansel's apparent reference to the 8th axle as the 4th axle during some parts of his investigation. See, *e.g.,* discussion in Chapp deposition, pp 117-127; Richardson dep, pp 9-18.

[5] During his deposition, Richard Hahey, the superintendent of IMS, confirmed that he had heard another IMS employee talking about a driver removing slag from between his tires. (Hahey, pp 43-45) Dean Rioux testified that Sevigny had told him that he needed to remove something from between his tires, and that Rioux had waited for him. (Rioux, p 50)

37-50) Dean Rioux also testified to the process of visually checking the tires, and stated that he had seen Sevigny do so before leaving IMS. (Rioux, pp 11-15, 99-100) Richard Hahey testified concerning the visual check of tires conducted by good drivers. (Hahey, p 44) Sevigny then drove to the entrance/exit to Front Street, where he exited the North Star property. (Sevigny, p 29) Upon inquiry, he testified that he had never seen other drivers do another check of their vehicle before actually leaving the property, and he was unaware of any custom in the industry of doing so. (Sevigny, pp 35-36) Rioux testified about the "circle check" of the truck which he does twice a day, as well as the tire check that is done at each yard. (Rioux, pp 17-18) According to Rioux, he has observed that Sevigny conducts a tire check at each yard they go to. (Rioux, p 48) Like Sevigny, Rioux conducted his tire check on the IMS premises after weighing in. (Rioux, pp 20, 37) Officer Chapp testified that while improper inspection of a vehicle is a violation of the Motor Carrier Act, no determination of an improper inspection had been made in this case. (Chapp, p 39)

Sevigny testified that he did not know if his truck had picked up anything after his check, although he acknowledged that trucks sometimes do pick up slag. (Sevigny, pp 35, 63) Dean Rioux testified that he had only once found a stone between his tires. (Rioux, pp 17, 20) Richard Hahey testified that it was not common for drivers to pick up things between their tires. (Hahey, p 46) Officer Chapp testified that he had not been personally involved in any accident where something had been caught between the duals, but he had seen cases where something was lodged, including something being launched,

although they were usually caught before this occurred. (Chapp, 85-86) He further testified that it was also possible for a truck to run over a rock and launch it that way as well. (Chapp, 86)

After leaving the North Star property, Sevigny headed west on Front street towards I-75, driving in the inside westbound lane. (Sevigny, p 55) He testified that as he left the property, his lift axles would have been up, and Officer Chapp testified that this was consistent with his knowledge of the practice. (Sevigny, pp 86-87, 92-93; Chapp, 113) Mr. Sevigny testified that there had also been another truck in front of him on the road that had six axles and was red. (Sevigny, pp 72-73)[6] He stated that he had not gone very far down the road toward I-75 when he heard a loud bang, and thought that he may have had a blow out. (Sevigny, pp 54) Rioux testified that he received a call from Sevigny, concerned about a possible blow out. (Rioux, p 52) Rioux explained that he returned to where Sevigny had parked because they had an agreement to ride and stay together, and keep each other company in the event of a problem, while they were in the United States. (Rioux, p 55)

Mr. Sevigny testified that, after hearing the loud sound, he looked to his left and did not see anything, but as he looked to his right, he saw a car crossing behind him. (Sevigny, 53) Plaintiff was the driver of that vehicle. At the time of the accident, Ronald Cutter was sitting in his truck, waiting to enter the main gate of North Star Steel. (Cutter, p 13) Cutter testified that he heard a hollow sound, as if an aluminum bat had hit a milk

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[6] Witness Ronald Cutter also testified about the presence of a red vehicle. (Cutter, p 15)

carton, and saw a white car veer to the left. (Cutter, pp 14-15) Another witness, Spencer Maniaci, had been in a vehicle behind the white Escort driven by plaintiff. (Maniaci, p 7) Maniaci testified that as the car passed a truck, he saw an object come through the back of the Escort and bounce off the truck, coming to land by the curb. (Maniaci, pp 7, 13) According to Maniaci, he pointed this object out to the police officer. (Maniaci, p 14)

The first officer dispatched to the scene of the accident was Corporal Brett Ansel, of the traffic division of the Monroe City police. (Ansel, p 10) Corporal Ansel testified concerning his investigation at the scene of the accident on the day of the accident, as well as several days later. Also present during some part of the investigation was Lieutenant Danny Richards, an accident investigator with the Monroe City police. (Richards, p 5, 7, 9-11) Officer Chapp, from the Michigan State Police, was not immediately called to participate in the investigation, and his involvement did not begin until several days later, on October 15. (Chapp, 15)[7] Lawrence Richardson, a sergeant with the Michigan State Police, specializing in accident reconstruction, was not contacted

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[7] By the time Officer Chapp was involved, the vehicle had already been released by the Monroe police, used normally for two days, and then returned. (Chapp, 18-19) Chapp testified that while it was common for him to be called to investigate in accidents such as this one, the suspected vehicle was usually impounded until he was able to inspect it, and this was the only case in which that had not occurred. (Chapp, 10-11) Chapp testified that this presented a problem because "[w]hen a vehicle is removed from the scene and we have no chain or track history of what has been done to the vehicle, now you have variables. And you have to look at different items and say, well, maybe this was broken, maybe this did contribute to the accident. But I can't prove that because I don't know what the track history is." (Chapp, 12)

by Corporal Ansel until October 19, and he testified that he had never examined Sevigny's vehicle. (Richardson, pp 4-8)[8] [9]

Ansel spoke to Marc Sevigny at the accident scene, and testified that Sevigny had told him that he had pulled his truck over to the side of the road after hearing a noise that he thought might be a blowout. (Ansel, p 29) According to Ansel, Sevigny also told him about pulling out a piece of slag from between his fourth axle, left side, before leaving the IMS property, and showed him the rub mark on the tire that was consistent with this effort. (Ansel, pp 31, 51) Sevigny's truck remained at the scene of the accident for a couple of hours, during which Ansel took photographs, including a photo of the 4th axle. (Ansel, p 50) During his deposition, Ansel testified that he thought that he may also have seen a mark on the 8th axle, but that he had not taken a photo of it at that time, indicating to him that he had not seen it on October 13. (Ansel, p 51) Ansel testified that he told Sevigny that he could take the truck and leave the scene, and did not tell him that the truck should not be used for its normal purposes of hauling steel and slag. (Ansel, pp 52-

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[8] Richardson testified that he did prepare a report, based in relevant part on information provided to him by Corporal Ansel, which information turned out to be unsubstantiated. Accordingly, Richardson testified that the conclusions reached in his report were without support. (Richardson, pp 9-14, 74)

[9] The deposition testimony of four experts (R. Matthew Brach, Thomas Bereza, Jonathan R. Crane, and Howard J. Bosscher) was also made part of the record below, although the circuit court excluded the testimony of Bereza, Crane and Bosscher on the basis that their testimony "lack[ed] the requisite evidentiary basis for want of specialized, scientific knowledge removing the testimony from the ambit of speculation." (Opinion, 11/20/01, p 8)

53) Ansel did not see the truck again until it was returned, at his request, on October 15. (Ansel, p 53)

Sevigny similarly testified that after speaking with the officer, he was told that he could leave. He testified that he drove that day to the premises of J.R. Phillips; the next day, October 14, he drove to Hamilton, Ontario, where he offloaded the material he had picked up at IMS, and then drove to Cambridge where he took on another load and then back to J.R. Phillips. Since he was advised that the police wanted to inspect the truck again, he drove back to the United States on October 15, going first to Ecorse where he offloaded the material picked up the previous day, and then took the truck to the police. (Sevigny, 24-28) Sevigny testified that he did not know if the object that hit the plaintiff's car had come from his truck. (Sevigny, p 78)

According to Sevigny, in the interim, two tires and a hub from the fourth axle had been replaced. (Sevigny, 7-71) Ansel also testified that when the truck was returned on October 15, there had been some changes: The right side set of duals at the 9th axle had been replaced, as well as the left side at the fourth axle. (Ansel, 60) However, he testified that the right side tires would not have been relevant to this accident, and he had already seen the mark on the fourth axle which had been pointed out by Sevigny on the day of the accident. (Ansel, 60) The tires that had been removed were subsequently provided to him by J.R. Phillips on October18, and he testified that he did not believe that he had been deprived of any evidence. (Ansel, 61) Officer Chapp also testified concerning the changes that had been made, and the provision of the equipment that had

been taken off. According to the Chapp, he considered the changes to have been normal maintenance, with one of the repairs to have been legally required, with the change of tires to have been discretionary. (Chapp, 23-32)

Ansel testified that when he inspected the truck on October 15, two days after the accident, he observed marks between the tires on the 8th axle, as well as a fresh mark on the fender in front of the pup that contained the 8th axle, and a piece of what he believed to be a very small piece of slag caught on the taillights. (Ansel, p 88) It was Ansel's theory that the projectile left the tires on the left side, hit the fender and the light, and then deflected up and hit plaintiff's car. (Ansel, 93) He further testified, however, that he had conducted no testing or lab work, and had found nothing on the day of the accident that would have come from Sevigny's truck. (Ansel, pp 101, 104) Ansel confirmed that he had no evidence that there had been something caught between the tires. (Ansel, p 116) Further, he did not know when the scratch on the fender had occurred, had taken no photograph of it on October 13, although he had been taking photos of relevant items, and had made no note of a scratch in his report. (Ansel, p 143) Officer Chapp testified that it was his belief that the projectile had come from the vicinity of the axles, but he was unable to be more definite. (Chapp, 34) As for the mark on the left rear of the taillight assembly, he was unable to conclude that it was related to this accident, (Chapp, 52-58), noting that the mark was "not consistent with a large piece of slag hitting it if it was flung from a tire." (Chapp, 56) He thought the mark to have been fairly fresh, meaning that it may have been there for several weeks, but no more. (Chapp, 58) Chapp confirmed that

in his report he had noted that, without the object, all information was circumstantial as to how this incident occurred. (Chapp, 55) Likewise, Sergeant Richardson testified that there was no evidence of a deflection of a large object off either the fourth or the eighth axles, and he agreed with Chapp's conclusion. (Richardson, pp 18, 37-57, 61, 103 *et seq*)

Both Ansel and Richards testified that they had looked for the object that had gone through the plaintiff's windshield. Richard Hahey, the superintendent of IMS, testified that, on the day of the accident, he thought he had seen an object in the middle of the road that had been there for several days and that, he thought, might have been clipped by a vehicle and sent into the plaintiff's windshield, and that he had given this information to a police officer. (Hahey, pp 36-38) Likewise, witness Spencer Maniaci testified that he thought that he had seen the object come to rest by the curb, and that he had pointed this out to the police. (Maniaci, pp 13-14) Maniaci also testified that the object he had seen looked like the object in a photograph (#22) taken by the police, but that he had been told by Corporal Ansel that nothing relevant had been found. (Maniaci, pp 28-36)

According to Ansel, some evidence had been picked up in the vicinity of the accident that had been viewed as possibilities. (Ansel, p 139) Richards testified that he had found many things at the scene, including rocks, pieces of metal, and concrete – some of which had been collected. (Richards, pp 19-21, 32) Richards testified that some of the items had had fresh scrape marks, and confirmed that he knew that Sevigny's truck was not carrying concrete. (Richards, 21) He also testified that he had not personally ruled out the concrete pieces that had been collected as the possible projectile, but that he did

not know where that concrete now was. (Richards, 32-33) He was unaware of any testing or lab work done on any of the material found at the scene, including the dusty material found on the steering wheel of the plaintiff's vehicle, and on her clothing. (Richards, 22-23, 28) Sergeant Richardson also testified that he had suggested that Ansel have an analysis done of the objects and material found at the scene and on the dashboard and steering wheel. (Richardson, pp 18-22, 38)

Ansel testified that he had taken photographs of the possible projectiles found in the area, including an object that he initially had thought was slag, and that could have been the relevant projectile, but that it had been concrete and not slag. (Ansel, p 41) He also found other objects that he thought had been possible projectiles, at least one of which had fresh scape marks, and two of which he collected as evidence. (Ansel, pp 43-47) None of these pieces were slag. (Ansel, pp 47, 79) Ansel concluded that one of the recovered pieces of concrete was not relevant because it appeared to have been in place for a period of time, although he was not able to rule out the other piece. (Ansel, p 48) He testified that he believed that the projectile that went through the windshield had been slag, although no testing was done, and no slag was ever found. (Ansel, pp 43, 101) He had absolutely no evidence that any concrete would have come from Sevigny's truck. (Ansel, p 48)

Officer Chapp testified that he had been shown something at the police station that was represented to be slag taken from the scene, but was a sample of slag taken by Ansel and not slag potentially associated with the accident. (Chapp, 49-50, 62-65) He was not,

however, aware of the concrete that had been taken at the scene and booked into evidence, although he would have found such evidence interesting. (Chapp, 63-67)

Both Ansel and Richards also testified concerning marks on the pavement. Richards testified that he had noted the existence of gouge marks in the pavement in the inside westbound lane of Front Street, and pointed them out to Ansel. (Richards, p 11) Ansel measured and painted the marks, and testified that he found them to be consistent with marks that would have been made by a truck with something caught between its tires, although he did not know when the marks had been made, or whose truck had made them. (Ansel, p 16, 58; Richards, pp 17, 22) Dean Rioux testified that those marks could not have been made by a truck with its lift axles up, or in the first several hundred yards after lift axles are lowered because there would not have been enough pressure in the tires. (Rioux, pp 104-105) Richards confirmed that Front Street serviced a great deal of heavy industry, and many trucks drove on it daily. (Richards, p18) Although Ansel's drawing depicting these marks showed them going across the eastbound lane into what he testified was the driveway of North Star Steel, (Ansel, 15), Richards testified that all of the marks had been in the westbound lane, and there were no marks in the eastbound lane that were associated with the pattern made by the marks in the westbound lane (Richards, p 13) Nor did the photographs of the marks that had been highlighted by orange paint demonstrate the existence of any marks on the eastbound lane. (Ansel, p 20) The only explanation for this discrepancy offered by Ansel was that the marks in the eastbound lane would have been harder to see. (Ansel, pp 19, 66-67) According to Richardson,

there were no marks in what would have been the "turning radius" of a truck, and that it was only a possibility that any marks found on the apron of the drive were made by the same vehicle as made the marks on the westbound lanes. (Richardson, pp 26, 28) Richardson testified that the measurements of the marks were consistent with any standard semi-tractor-trailer tires. (Richardson, p 35)

Ansel testified that he had no other evidence to explain how the accident had occurred. (Ansel, p 54) He testified that he had had no tests conducted on material collected at the scene, including dust found on the steering wheel of plaintiff's car that he believed would likely have been residue from the projectile. (Ansel, p 55) He had conducted no investigation concerning the material being hauled by the other trucks which had been in the eastbound lane in front of the plaintiff's vehicle. (Ansel, p 65) He also testified that none of the witnesses had indicated hearing the kind of noise that would have been emitted by a truck causing the gouge marks he had found in the westbound lane. (Ansel, pp 161-162) (See also, Cutter, p 33)

According to Richards, he could only speculate as to what had caused the accident, confirming that no slag had been found at the scene, and that no one had reported the removal of any slag. (Richards, p 35) [Witnesses Cutter and Maniaci both testified that they had not seen anyone removing anything from the scene. (Cutter, p 32; Maniaci, p 38)] Richards speculated that something may have come off a truck, been deflected, and hit the plaintiff's vehicle, but admitted that he did not know. (Richards, pp 57-58) He

also testified that in his years as a police officer (since 1976), he had never seen anything similar, where an object was launched from between tires. (Richards, pp 5, 57-58)

Likewise, Officer Chapp felt that he could do nothing more than advance hypotheticals and speculate:

> That would be the vehicle either picked something up off the road or it had something in between the tires someplace that the driver might have missed. And once it reached that certain location and speed, the centrifugal force, if it was lodged between the duals, it dislodged it. And it may have hit another tire or it may have partially disintegrated and then deflected. These are hypotheticals. And I have to be very careful on these hypotheticals. Or if it picked something up from the roadway, again, it could have lodged, picked it up, centrifugal force, it dislodges, and it shoots out.
>
> * * *
>
> So in answer to your question, it was – it was my understanding, at the end of all of the investigation that I was able to do, that it was possible that the driver was responsible if something had been lodged and he missed it or he couldn't get it out.
>
> But it was, also, equally possible that something was on the roadway and the driver picked it up on the way, unknown to his knowledge or ability. He would not have been capable of knowing that he had run over it and it had lodged.
>
> (Chapp, 79-80)

See also, Chapp, pp 126-127.

So too, Richardson could offer no conclusions beyond speculation. He testified that the "missing link" was the object and knowledge of where it ended up. (Richardson, p 50) When asked his opinion as to what caused the accident, he replied: "An object went through the windshield and subsequently struck the victim in this particular case and subsequently came out the rear of the vehicle." (Richardson, pp 74-75) See also,

Richardson's testimony at pp 103-121 of his deposition, where he testified, *inter alia*, that he saw no evidence of a deflection off the fourth axle, that he had seen instances of both an object lodged in duals being launched into an oncoming vehicle, and of an object in the road sent flying from being run over, and of a part being dislodged from a traveling vehicle. At pages 116-117, Richardson testified as follows:

Q. Let's just, if you don't mind, finish up the series of questions that Mr. Matusz suggested. He asked you if it's possible that an object was lodged between the tires and was launched and somehow hit Ms. Williams' car, and you said it was possible, correct?

A. Correct.

Q. Is it also possible that the truck could have run over something which caused it to be launched into her car?

A. Yes.

Q. And is it also possible something could have fallen off the truck and hit her car?

A. Yes.

Q. And is it also possible that a part from the truck could have become dislodged and hit the car?

A. I have a problem with that one because of the composition of the markings that were on the dash and the steering column.

Q. Of the three scenarios that were possible, is one more possible than others, more likely than others?

A. Well, the first two are possible. The third one I would discount.

Q. That something fell off the truck?

A. Yes. No. A piece of equipment off the truck?

Q. I'm sorry. I will go through the three again. One is that something was between the tires, the second is that the truck ran over something and cause it to hit her car, and the third one is that something fell off the truck, such as some of the cargo.

Of those three event, is there one that's more likely than the others to have occurred?

A. The one that most likely wouldn't have occurred would probably be the one where it actually fell off the truck, because basically I'm hoping, when they made their vehicle examination, that they didn't observe it sitting on top of the bed of the truck, the trailer.

Q. Okay. But the other two were equally likely, in your opinion?

A. Yes.

The deposition testimony of R. Matthew Brach, retained by North Star Steel, was similar. Brach testified that he did not know what the nature of the object was, where it had come from, or how it had been propelled into the plaintiff's car. (Brach, pp 21-24) He testified that he did not believe that the object was slag, because slag tended to come apart and fragment, and he would have expected to find more of it within the plaintiff's vehicle. (Brach, pp 24, 31, 98) According to Brach, the object would have to have been propelled with great force, and it could have been kicked up by a passing truck or discharged from between the tires, but he could not tell. (Brach, pp 31, 33, 71) Brach testified that he had no evidence that the object came from between the tires of the truck, although it would have to have deflected off the truck and there was no evidence of the necessary deflection on Sevigny's truck. (Brach, pp 38, 41, 50-51) Since he had been asked to consider only the possibility that the object had been caught between the tires of the truck, that was the only scenario he could speak to. (Brach, pp 47-48) Accordingly,

as far as he knew, this was the most likely scenario, although the known evidence did not support it. (Brach, pp 38, 41, 50-51) If it came from between the tires of a truck, it would likely have come from an oncoming vehicle. (Brach, pp 36, 39) He thought it likely that it would have come from Sevigny's truck, either by kicking up an object laying in the street, or propelled from between the tires, but he had no opinion as to how it would have been propelled. (Brach, pp 40)

[Jonathan Crane, plaintiff's proffered expert engineer, testified that he had done no independent analysis to determine what the object was, he did not know where a truck would have picked up the object, and he had no independent basis to opine that the object was slag that came from Sevigny's vehicle. (Crane, pp 16-18, 31, 40, 45-47) Plaintiff's proffered expert in accident reconstruction, Thomas Bereza, opined that Sevigny had picked up a piece of slag in his 8th axle which was propelled through plaintiff's windshield, although he had no calculations to substantiate the opinion, and he had never inspected the 8th axle. (Bereza, pp 56-59, 77-86) He testified that there was no evidence from which one could determine where the object may have been picked up (Bereza, pp 66-67, 155), and agreed that, based on available evidence, one would need to speculate to conclude that the mark found on the Sevigny trailer was made from being hit by a piece of slag (Bereza, pp 86-88).][10] On the other hand, the analysis done by plaintiff's expert, Scott Stoeffler, ruled out the possibility that the object that went through the plaintiff's

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[10] As noted *supra*, and discussed *infra*, the circuit court excluded the testimony of Crane and Bereza, as well as the testimony of Howard Bosscher, and this ruling was affirmed on appeal.

windshield had left a mark on the trailer. (See Stoeffler report, attached to Brief in Support of Defendants J.R. Phillips and Marc Sevigny's Supplement to Motion for Summary Disposition.)

Various motions for summary disposition were filed on behalf of each defendant. It was the position of these defendants that Sevigny had not violated any provision of either the Michigan Motor Vehicle Act or the Federal Motor Carrier Act, that he had breached no duties arguably owed to plaintiff, and that, in any event, plaintiff's theory of liability against them was premised only on conjecture and speculation. The motions filed by defendants North Star and International Mill Service likewise contended that the record could not support an imposition of liability against them. The first set of motions were heard by the circuit court on September 26, 2001. (TR 9/26/01) At the conclusion of the hearing, the court took the matter under advisement. (TR 9/26/01, p 49) Following supplemental briefing, the court issued its opinion, dated March 5, 2002, denying the motions for summary disposition, and concluding that genuine issues of material fact existed. An order denying the motion of defendants Sevigny and J.R. Phillips was entered on March 26, 2002.

Thereafter, and following additional discovery, all defendants again moved for summary disposition. Included in the motion filed on or about October 4, 2002, on behalf of defendants Sevigny and J.R. Phillips, was a motion in limine, asking the court to exclude the expert testimony proffered by plaintiff of Thomas Bereza, Jonathan Crane and Howard Bosschler. It was defendants' contention that the testimony of each of these

witnesses was both unreliable and without foundation. The hearing on these motions was held on November 6, 2002, and resulted in an opinion dated November 20, 2002, in which the circuit court granted defendants' motions for summary disposition, as well as the motion to exclude the expert testimony. Noting the reality that the object that went through plaintiff's windshield had never been located, the circuit court found that plaintiff was unable to establish a genuine issue of material fact on the question of causation:

> In the case at bar, there lacks adequate evidence for a reasonable trier of fact to conclude Defendants proximately caused Plaintiff's injury. The object has never been discovered. Test results report the object was comprised of ubiquitous materials: iron and paint. Plaintiffs' expert witnesses' testimony conclude and speculate with regard to their theories that proffer no basis in fact for the source of the object linked to Defendants' premises or actions. Plaintiffs' allegations lack the requisite linkage. While Plaintiffs' theory may be conceivably true, Michigan law does not permit a jury to speculate between a couple or more coequally supposable causes of injury.
>
> (Opinion 11/20/02, pp 5-6)

The circuit court also granted summary disposition to defendants Sevigny and J.R. Phillips on the basis that, contrary to plaintiff's contention, these defendants owed plaintiff "no duty to complete multiple tire inspections due to the unforeseeable nature of the unfortunate event," acknowledging the unpublished status of the Court of Appeals opinion in *Malloy v McClure Trucking*, CA #223045 (8/21/01), while adopting its reasoning. (Opinion 11/20/02, p 8) Finally, the circuit court also granted defendants' motion in limine and excluded the testimony of plaintiff's experts:

> For the reasons contained in the record, this Court finds the testimony of Plaintiffs' expert witnesses lack the requisite evidentiary basis for want of specialized, scientific knowledge removing the testimony from the ambit of

> speculation. In particular, this Court notes the conspicuous absence of notes, documents, scientific calculations, authority regulations of industry standards [sic], rules or other basis in law to support the expert witnesses' testimony.
>
> (Opinion 11/20/02, p 8)

Plaintiff sought review of these rulings from the Michigan Court of Appeals. In opinions released on December 7, 2004, a majority of the Court reversed the order of summary disposition, but without concluding that defendants Sevigny or J.R. Phillips Trucking had owed any relevant duty to plaintiff's decedent. The dissenting opinion would have held that no duty was owed, and that there was no evidence that any arguable duty had been breached. [The opinion of the Court of Appeals is attached hereto as Exhibit B.]

Defendants Sevigny and J.R. Phillips herein seek review of the majority rulings regarding both duty and proximate cause.

STANDARD OF REVIEW

Plaintiff, Beverly Heikkila, Personal Representative of the Estate of Sheri L. Williams, sought review of the circuit court's order which granted summary disposition to each of the defendants on the basis that plaintiff was unable to establish the existence of proximate cause without resort to speculation and conjecture. The standard of review was *de novo*. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 324 (1998).

The circuit court had also granted summary disposition to defendants, Marc Sevigny and J.R. Phillips Trucking, Ltd., on the basis that they owed no duties to plaintiff that were arguably breached in this case. The issue of duty presented a question of law, and, as such, the standard of review was *de novo*. *Alex v Wildfong*, 460 Mich 10, 21 (1999).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY CONCLUDED THAT MARC SEVIGNY OWED NO DUTY TO PLAINTIFF TO CONDUCT MULTIPLE INSPECTIONS OF HIS TIRES BEFORE LEAVING THE PREMISES OF NORTH STAR STEEL.

The threshold inquiry in every negligence action concerns the requisite element of a duty running between the plaintiff and the defendant. As concisely explained by the Michigan Supreme Court in *Moning v Alfono*, 400 Mich 425, 438-439 (1977): "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." As recently stated by this Court in *Fultz v Union-Commerce Associates*, 470 Mich 460, 463 (2004), quoting from *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262 (1997): "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." And in *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 (2004), the Supreme Court explained:

> * * * In determining whether a legal duty exists, courts examine a variety of factors, including "foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, and . . . the burdens and consequences of imposing a duty and the resulting liability for breach."

On defendants' motion for summary disposition, the circuit court concluded that defendants owed plaintiff "no duty to complete multiple tire inspections due to the unforeseeable nature of the unfortunate event."

However, a majority of the Court of Appeals reversed this conclusion, without themselves concluding that a duty was, in fact, either owed or arguably breached. Rather, focusing solely on the question of "foreseeability", the majority held that questions of fact existed regarding the condition of the roadway which were relevant to the duty inquiry. However, as discussed below, this conclusion ignores the other considerations which are relevant to the question of duty, which considerations were presented to the court and compelled the rejection of the contention that Sevigny owed a duty of inspection that was breached. As explained by the dissenting opinion of Judge Kelly:

> As recognized by the majority, the "facts developed during discovery were directed primarily at the issue of foreseeability." Yet, the legal determination of duty does not rely on foreseeability alone, but implicates several other factors. Plaintiffs have not produced any evidence that would support the finding of a relationship between the decedent and defendants, special circumstances, the degree of certainty of injury, any connection between defendant's conduct and the decedent's injury, moral blame attached to defendants' conduct, or the burdens and consequences of imposing a duty under these circumstances. *Beaudrie [v Henderson*, 465 Mich 124 (2001)], *supra* at 124; *Krass [v Tri-County Security, Inc*, 233 Mich App 661 (1999)] *supra* at 667-669. As a matter of law, plaintiff points to no cause or statute establishing a special relationship or circumstance. Plaintiff also cites no regulation or industry standard imposing a duty of inspection before entering onto a public roadway. On this record, no genuine issues of material fact exist regarding "what characteristics giving rise to a duty are present." *Howe [v Detroit Free Press, Inc*, 219 Mich App 150 (1996)] *supra* at 156. The trial court did not err in concluding, as a matter of law, that Sevigny and Philips owed no duty to the decedent.
>
> Yet I would point out that even assuming an on-going duty to inspect tires and further assuming Sevigny's tires picked up an object after his last inspection, the evidence does not establish that Sevigny breached the alleged duty to inspect tires before leaving North Star Premises. There is no evidence that Sevigny's truck picked up any object *before* leaving the North Star, the point at which plaintiff alleges that Sevigny had a duty to inspect.

> The gouge marks relied on by plaintiff indicate that an object was picked up, at the earliest, as the truck drove over the apron abutting Front Street, which would have been *after* the point in time plaintiff alleges Sevigny should have inspected the tire. Thus, the fact that the object was picked up by the truck, does not create a genuine issue of fact as to whether Sevigny inspected the tires before he left North Star as plaintiff alleged he should have.
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> (Dissenting opinion, page 5)

Thus, even were the majority opinion correct concerning the existence of factual issues which might be pertinent to the question of "foreseeability", there are no genuine issues of material fact concerning the other considerations which, as noted by the Michigan Supreme Court in *Buczkowski v McKay*, 441 Mich 96, 101 (1992), are usually more important considerations than foreseeability.

As argued to the Court of Appeals, plaintiff complained that drivers leaving the North Star premises had a duty to check their tires for chunks of metal. Of course, there was no dispute that Sevigny *did* check his tires after loading and before leaving the North Star premises. Indeed, he did so twice – once after dumping part of his load, and once after being reweighed. Indeed, there was no dispute that these inspections went beyond that required to be performed under federal law. See 49 CFR §§396.3, 396.11 and 396.13.[11] Plaintiff, however, contended that at some closer distance from the public roadway, and because of the potential danger of picking up a piece of metal that could be

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[11] Plaintiff's citation, at page 35 of her Appellant's Brief, to 49 CFR §396.7 was inapposite, as this section refers to the duties imposed at the start of the day, and not to any continuing duty to inspect during the course of the day. See, for example, the deposition testimony of plaintiff's proposed experts, Thomas Bereza, at page 39, and Howard Bosscher, at page 12.

expelled, Sevigny should have checked his tires again.[12] However, plaintiff did not and could not point to any rule, regulation, or industry standard requiring such an inspection.

Although an unpublished opinion, the circuit court properly adopted the analysis of the Michigan Court of Appeals opinion in *Malloy v McClure*, CA #223045 (8/21/01), a copy of which is attached hereto as Exhibit C. In *Malloy*, as in the case at bar, plaintiff alleged that a rock had been embedded in the defendant driver's truck, and that the rock dislodged and went through plaintiff's windshield. As in the case at bar, plaintiff alleged that the driver had breached a duty to inspect his truck prior to leaving the co-defendant's yard, where he had delivered a load of logs. As in the case at bar, the trial court had granted summary disposition in favor of defendant driver. The Court of Appeals therein affirmed, finding that no duty existed.

> Plaintiff argues that the trial court erred by granting McClure's motion for summary disposition. We disagree and affirm. On the day the accident occurred, prior to beginning work, McClure inspected his truck and found that it was safe to operate. Plaintiff's expert witness acknowledged that under federal regulations, if after an initial inspection a truck is found to be free of defects, any subsequent inspections during the day are at the discretion of the driver. The evidence showed that McClure made regular deliveries to Nemroc's yard; however, no evidence showed that McClure knew that on any previous occasion a rock from that yard had lodged in a tire on his truck. If the events leading to an injury are not foreseeable, a duty does not exist, and summary disposition is appropriate. *Johnson v Detroit*, 457 Mich 695, 711; 579 NW2d 895 (1998). The trial court correctly concluded that McClure had no duty to inspect his truck before leaving Nemroc's yard because the unusual sequence of events which

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[12] Of course, and as recognized by the dissenting opinion in the Court of Appeals, assuming that Sevigny's tires picked up some slag after his last inspection, there is no evidence that he picked it up before leaving the North Star premises, rather than on the roadway itself – or that he might not have picked it up after any inspection allegedly required by plaintiff's theory.

resulted in decedent's death was simply not reasonably foreseeable. Summary disposition was properly granted. *Id.*

Contrary to the implications of plaintiff's argument below, the legal conclusion that a danger is "foreseeable" requires something more than a mere showing that the danger was possible. Nor, for that matter, does the law impose a duty on one person for the protection of another simply because the danger is foreseeable. As explained by the Michigan Court of Appeals in *Krass v Tri-County Security, Inc*, 233 Mich App 661, 669-669 (1999):

> The question of duty turns on the relationship existing between the actor and the injured person. *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977). In determining whether a duty exists, courts look to different variables, including: foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach. *Buczkowski v McKay*, 441 Mich 96, 100-101, n4; 490 NW2d 330 (1992); *Babula, supra* at 49. See also, *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 203; 544 NW2d 727 (1996). As the court noted in *Buczkowski, supra* at 100:
>
> > For purposes of this case we distinguish between duty as the problem of the relational obligation between the plaintiff and the defendant, and the standard of care that in negligence cases is always reasonable conduct. Thus, the duty to use "reasonable care" is the standard for liability rather than the antecedent conclusion that a particular plaintiff has protection against a particular defendant's conduct, or that a particular defendant owes any specific duty to a particular plaintiff. Duty is actually a "'question of whether the defendant is under any obligation for the benefit of the particular plaintiff' and concerns 'the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other.'" *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981); Prosser & Keeton, Torts (5th ed.), §53, p 356. "'Duty' is not sacrosanct in itself, but is only an expression of the sum total of those

considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Id.*, p 358. See also *Friedman v Dozorc, supra,* and *Antcliff v State Employees Credit Union*, 414 Mich 624, 631; 327 NW2d 814 (1982).

Application of these factors in the case at bar supported the circuit court's conclusion that defendants Sevigny and J.R. Phillips did not owe plaintiff the duty to inspect the tires of the truck before leaving the North Star premises. The evidence would only support the conclusion that it was possible, but not legally foreseeable, that the truck would pick up a piece of slag on the driveway of the premises after the inspection was conducted, and that the embedded piece of slag would be discharged into an oncoming vehicle. Indeed, all of the testimony was that this danger, while possible, was unusual, and there was no evidence that this had ever happened to defendant Sevigny. Moreover, there was no relationship between the parties to this litigation, the connection between the conduct and the injury was speculative, there is no moral blame to be attached, it would be speculative to conclude that another inspection would prevent future harm, and the burdens imposed by imposition of the non-specific duty alleged by plaintiff would be onerous.

Furthermore, the case at bar does not present a situation where the action of the defendant actually increased the danger to the plaintiff. Rather, the negligence alleged by plaintiff against defendant Sevigny was premised on alleged acts of omission, or nonfeasance, not on active misconduct, or misfeasance. In the absence of a "special relationship," such allegations will not give rise to a duty to protect a third party. See *Williams v Cunningham Drug Stores*, 429 Mich 495, 498-499 (1999); *Krass v Tri-County*

Security, Inc, 233 Mich App 661, 669-670 (1999); and *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8-10 (1992). No such special relationship is alleged, and none existed.

Finally, plaintiff attempted to avoid the conclusion that Sevigny did not owe a duty to plaintiff to inspect his tires at the location, with the frequency, or in the manner she alleges, by suggesting that Sevigny assumed this duty when he did, in fact, inspect the tires while on the North Star premises. Citing *Shenk v Mercury Marine*, 155 Mich App 20 (1986) and *Clark v Dalman*, 379 Mich 251, 261 (1967), plaintiff argued that "[o]ne who engages in the performance of an undertaking has an obligation to use due care or to act so as to not unreasonably endanger the person or property of another." However, as noted above, the conduct of the defendant in the case at bar did not increase the danger to the plaintiff, so as to give rise to a potential duty to warn of that increased danger, as in *Clark, supra*. Nor did defendant Sevigny act so as to render a service to plaintiff. As the Court stated in *Shenk, supra*, when it rejected the plaintiff's contention that the defendant had assumed a duty to plaintiff when he provided her with waders to wear while duck hunting: "It is not enough that an individual simply acts. The act must have been one to render service to another. *Smith v Allendale Mutual Ins Co*, 410 Mich 685; 303 NW2d 702 (1981), *reh den* 411 Mich 1154 (1981)." In *Smith v Allendale Mutual Ins Co*, 410 Mich 685 (1981), the Michigan Supreme Court rejected the argument that an insurer who had conducted an inspection of the premises had, in the absence of an intent or agreement

to provide a service to another, assumed the duty to conduct the inspection in a non-negligent manner.

In any event, Michigan law simply does not support the proposition that a duty will be imposed on one who voluntarily undertakes a safety precaution, such that liability can be imposed on him if those measures are less effective than they might have been. See, *e.g.*, *Williams v Cunningham Drug Stores*, 429 Mich 495 (1999). This is essentially the argument that plaintiff made in the case at bar, it was properly rejected by the circuit court, and should have been affirmed on appeal.

II. WHERE PLAINTIFF SOUGHT TO IMPOSE LIABILITY ON DEFENDANTS MARC SEVIGNY AND J.R. PHILLIPS TRUCKING, PREMISED ON A THEORY THAT SLAG EMBEDDED BETWEEN THE TIRES OF SEVIGNY'S TRUCK HAD DISLODGED AND WAS PROPELLED INTO PLAINTIFF'S WINDSHIELD, SUMMARY DISPOSITION WAS PROPERLY GRANTED TO DEFENDANTS WHERE, *INTER ALIA*, THERE WAS NO EVIDENCE THAT ANY OBJECT HAD ACTUALLY BEEN EMBEDDED BETWEEN THE TIRES, AND WHERE THERE WAS NO EVIDENCE THAT THE OBJECT THAT WENT THROUGH PLAINTIFF'S WINDSHIELD WAS SLAG, AND WHERE THERE WAS NO EVIDENCE THAT ANY EXTRA INSPECTIONS WOULD HAVE AVOIDED THIS ACCIDENT.

The Court of Appeals also erred when it reversed the circuit court's determination that the evidence was insufficient to support a conclusion that the defendants' conduct was a proximate cause of plaintiff's injuries because, to reach this conclusion, the trier of fact would necessarily engage in conjecture and speculation.

The evidence in this case supported a conclusion that, on October 13, 1999, plaintiff's decedent, Sherri Williams, was driving her car eastbound on Front Street in

Monroe, Michigan, when an object went through her windshield, struck her in the head, and continued out her back window. The evidence also supported a conclusion that a truck driven by Mark Sevigny and owned by defendant J.R. Phillips was traveling westbound on Front Street, in the vicinity of plaintiff's vehicle, when the incident occurred. It is also true that Sevigny had recently exited premises owned by defendant North Star Steel, having loaded up his trailers with slag at premises leased from North Star by defendant International Mill Service, Inc.

The object that went through the plaintiff's windshield was never identified, even though the investigating officers did locate some objects that appeared potentially relevant, and did retrieve several of those objects as evidence. No testing was done on these objects by the officers, including testing to determine if any were consistent with residue found in plaintiff's car. No slag was found at the scene. There were gouge marks found in the westbound lanes of Front Street that were consistent with marks that *could* have been made by Sevigny's tires *if* a piece of slag had become embedded between Sevigny's tires, although these marks could *also* have been made by most standard tractor trailer tires, and there is no evidence that a piece of slag, *in fact,* had been embedded between his tires when he left the North Star property. Nor did any one in the vicinity of the incident hear the loud noise that would have been made by a truck traveling with slag embedded it its tires. There was testimony that a truck *could* have kicked up an object lying in the road, propelling it through plaintiff's windshield, *and* there was testimony that the object *could* have been embedded in a truck's tires when it dislodged and was

propelled into plaintiff's windshield, but there was no testimony from which one could reasonably conclude which one of these events had occurred. There was also testimony that *if* the object had been propelled from between tires, it would necessarily have deflected off the truck, leaving a significant mark. There were no marks on Sevigny's truck that were consistent with this having occurred.

It is, nevertheless, plaintiff's theory that Mark Sevigny's vehicle picked up slag between its tires while on the premises of International Mill and North Star Steel, and that as he proceeded westbound on Front Street, the slag dislodged and was propelled into plaintiff's car. But, contrary to the Court of Appeals majority, there was no evidence from which a jury could reasonably accept this theory as fact, and impose liability on Mark Sevigny and his employer, J.R. Phillips, for the death of Sherri Williams. The circuit court had properly granted summary disposition to defendants, stating:

> In the case at bar, there lacks adequate evidence for a reasonable trier of fact to conclude Defendants proximately caused Plaintiff's injury. The object has never been discovered. Test results report the object was comprised of ubiquitous materials; iron and paint. Plaintiffs' expert witnesses' testimony conclude and speculate with regard to their theories that proffer no basis in fact for the source of the object linked to Defendants' premises or actions. Plaintiffs' allegations lack the requisite linkage. While Plaintiffs' theory may be conceivably true, Michigan law does not permit a jury to speculate between a couple or more coequally supposable causes of injury.
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> (Opinion 11/20/02, pp 5-6)

Plaintiff, however, argued that the circuit court erred, suggesting that the proximity of the Sevigny vehicle to the accident was sufficient to conclude that it had been involved, that plaintiff's expert report concerning the finding of metal fragments in

plaintiff's vehicle was sufficient to conclude that the relevant object was neither a rock, a stone nor concrete [although that testing also excluded something coming from Sevigny's 8th axle], and that the gouge marks found in the road were sufficient to conclude that slag had been embedded in the tires of a truck. Plaintiff further argued that it would be reasonable to conclude that the truck with the embedded slag was Sevigny's truck, and that this slag was propelled into plaintiff's vehicle, because of cuts in his tires and a mark on his truck. What plaintiff's argument fails to account for, however, is that the cuts in the tires were from the 4th axle, while the mark on the truck was in front of the **8th** axle, and all of the testimony is that this mark was not, in any event, consistent with being hit by a piece of deflecting slag. Plaintiff also ignored the undisputed testimony of Danny Richards, Paul Chapp, Lawrence Richardson and Matthew Brach, that one could only speculate whether the object was propelled through plaintiff's vehicle by being kicked up by a truck, or dislodged from between the tires. Nor is there any evidence as to when this alleged piece of slag was picked up by the truck. Thus, even if Sevigny's truck picked up a piece of slag at some unidentified point on the North Star property, or on the road after turning off the property, the incident cannot be causally linked to any alleged breach of duty regarding the inspection of his vehicle.

The record makes clear that, *inter alia*, without identification of the object that went through plaintiff's windshield, it is impossible to determine the cause of the accident, and it is impossible to conclude that defendants were legally responsible for that

accident.[13] Perhaps in recognition of this reality, albeit without specifically using the term, plaintiff essentially relied on the doctrine of *res ipsa loquitur* to sustain her cause of action.[14] As discussed below, the doctrine is clearly inapplicable. As in *Moody v Chevron Chemical Co*, 201 Mich App 232 (1993), without the instrumentality of injury, it has proven impossible to create a record that would allow the trier to fact to impose liability on defendants.

Even if one were to assume that Sevigny's vehicle was somehow involved in propelling an object into plaintiff's windshield, it is not only mere speculation to theorize that the object was propelled into plaintiff's windshield from between two tires, it is also speculative to theorize that it was slag and that, had Sevigny inspected his vehicle at some point after his actual inspections and before he passed plaintiff's vehicle (and assuming the existence of a duty to do so), the accident would not have happened. As in *Skinner v Square D*, 445 Mich 153 (1994), plaintiff's theory of liability is based solely on circumstantial evidence. And as in *Skinner, supra*, this circumstantial evidence does not constitute substantial evidence and does not suffice to allow a reasonable inference that, but for Sevigny's alleged failure to properly inspect his truck, plaintiff would not have been injured. See also, *Auto Club Ins Assoc v General Motors Corp*, 217 Mich App 594, 605-606 (1996).

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[13] The record is also clear that the object may have been picked up by the investigating officers but discounted without relevant testing, or it may have been noticed by the investigating officers and discounted at the scene.

[14] See plaintiff's Appellant Brief to the Court of Appeals, p 27.

In *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422 (1956), the Michigan Supreme Court discussed the rule concerning conjecture and speculation as applied in Michigan, quoting *Bessemer v Clowdus*, 261 Ala 388, 394; 74 So2d 259 (1954):

> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

Plaintiff's theory that a piece of slag had dislodged from Sevigny's tires and was propelled into plaintiff's vehicle is arguably "an explanation consistent with known facts or conditions," but it is "not deducible from them as a reasonable inference. This doctrine, more recently reaffirmed by the Michigan Supreme Court in *Skinner v Square D*, 445 Mich 153 (1994), discussed *infra*, is evident in the Michigan Court of Appeals opinion in *Genesee Merchants Bank & Trust v Payne*, 6 Mich App 204 (1967); *aff'd by equally divided court*, 381 Mich 234 (1968), where the minor plaintiff cut her foot on some object in the defendant's yard. After the injury a piece of glass was found in the vicinity of where the injury occurred. Reversing a verdict entered against the defendant, the Court of Appeals cited *Kaminski, supra*, and explained, at 209:

> The record fails to show what caused the injury. From the evidence that glass was found in the area where she had played after the child was cut, it is tempting to conjecture that the glass caused the cut. But factfinders, be they jury or court, may not indulge in conjecture. See *Kaminski v Grand Trunk W R Co* (1956), 347 Mich 417. They are constrained to draw

reasonable inferences from established facts. Reasoning "post hoc ergo propter hoc" does not meet this test.

So too, in the case at bar, the record fails to show what caused plaintiff's injury, and while it may be tempting to blame the driver of the truck that was in the vicinity when the incident occurred, it is impossible to reasonably draw this conclusion from established facts.[15]

Further clarification of the distinction between legitimate inferences and impermissible conjecture and speculation was offered by the Michigan Supreme Court in *Skinner v Square D*, 445 Mich 153 (1994). *Skinner* was a products liability action in which the claim was made that the plaintiff had been electrocuted as a result of a defective switch manufactured by the defendant. Specifically, it was claimed that while using machinery containing the switch, plaintiff became confused about whether the switch was on or off. While the existence of the accident was clear, there were no witnesses. The question was, *assuming the switch was, in fact, defective*, had the plaintiff produced sufficient evidence to avoid summary disposition.[16]

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[15] As noted in Justice Taylor's dissenting opinion in *Rogers v City of Detroit*, 457 Mich 125, 168 (1998), *majority opinion overruled by Robinson v City of Detroit*, 462 Mich 439 (2000): "This hindsight-based analysis, in a disciplined legal system, logically cannot be the basis for a finding of negligence. Indeed, it is to engage in the logical fallacy of post hoc ergo propter hoc (after this, therefore in consequence of this) that is impermissible." See also, *West v General Motors Corp*, 469 Mich 177, 186, n12 (2003).

[16] Similarly, in the case at bar, this argument *assumes* that Sevigny had the duty to inspect his vehicle as alleged by plaintiff, and that this duty was breached. However, as discussed *supra*, there was no such duty.

Clarifying the distinction between "cause in fact" and "proximate cause", the Supreme court explained that the question before it involved "cause in fact." "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." (445 Mich, 163) Cause in fact is also the initial question in the case at bar. The plaintiff must necessarily claim that 'but for' the defendants' alleged breach of duties, the accident would not have happened. In *Skinner* there were no eye witnesses, and the Court confirmed that the plaintiff was forced to rely on circumstantial evidence in proving the case. (445 Mich, 163) However, the burden of proof was not lessened and remained on the plaintiff:

> While plaintiffs may show causation circumstantially, the mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation:
>
> > That there was no eyewitness to the accident does not always prevent the making of a possible issue of fact for the jury. But the burden of establishing proximate cause * * * always rests with the complaining party, and no presumption of it is created by the mere fact of an accident. * * *
>
> (445 Mich, 163-164)

The *Skinner* Court then went on to approve the distinction drawn in *Kaminski v Grand Trunk W R Co*, 347 Mich 417 (1956), discussed *supra*, between reasonable inferences and impermissible conjecture, offering additional clarification:

> We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. As *Kaminski* explains, at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial

> evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.
>
> (445 Mich, 164-165)

Facts which offer a *possibility* of causation are not sufficient; the evidence must establish a reasonable basis to conclude that it was *more likely than not* that defendant's conduct caused the injury. *See also*, *Craig v Oakwood Hospital*, 471 Mich 67, 87 (2004). ["Our case law requires more than a mere possibility or a plausible explanation."] In the case at bar, plaintiff's theory is, at best, a mere possibility and the record did not support submission of this theory to a finder of fact. As the Michigan Supreme Court explained in *Howe v Michigan Central RR Co*, 236 Mich 577, 584 (1926), cited in *Skinner, supra*, 445 Mich, 164:

> That there was no eyewitness to the accident does not always prevent the making of a possible issue of fact for the jury. But the burden of establishing proximate cause, as well as that of negligence, always rests upon the complaining party, and no presumption of it is created by the mere fact of an accident. Something more should be offered the jury than a situation which, by ingenious interpretation, suggests the mere possibility of defendant's negligence being the cause of the injury.

See also, *Garabedian v William Beaumont Hospital*, 208 Mich App 473 (1995), where the Court of Appeals affirmed a directed verdict alleging nursing malpractice when a 87-year-old woman fell out of her hospital bed. Plaintiff had produced testimony to the effect that (1) an assessment of plaintiff's mental condition had not been done; (2) that had there been one, it might have revealed a need for intervention; and (3) if it had revealed such a need, the intervention selected might have prevented the accident. The Court held that this evidence was insufficient to "establish a reasonable basis for

concluding that it is more likely than not that conduct by defendant's employees was a cause of plaintiff's injuries." (208 Mich App, 476) This is similar to plaintiff's argument that Sevigny had not inspected his tires immediately before leaving the North Star premises, that had he done so, he might have discovered slag between his tires, and, if so, the accident may have been prevented. This is nothing more than speculation and conjecture.

Likewise, in *Hasselbach v TG Canton, Inc*, 209 Mich App 475 (1995), the plaintiff could produce no evidence concerning the temperature of the shower water which allegedly scalded her husband, causing him to back into her while helping with his shower. The Court of Appeals affirmed summary disposition on behalf of the landlord, the installer of the hot water heater, and the manufacturer of the hot water heater, even though there was arguably evidence that the water heater was capable of producing scalding water. There was no evidence that it *had* produced scalding water. Similarly, in the case at bar there is no evidence that a piece of slag was embedded in Sevigny's tires, or that it had been dislodged and propelled into plaintiff's vehicle.

Plaintiff argued, however, that her theory must be more than mere conjecture because it is the only theory that defense expert, Matthew Brach, could offer, and because "defendants have failed to establish any other possible basis." (Appellant Brief, p 24) This was a fallacious argument. First of all, even if there were only one proffered theory of how the accident occurred, that theory must, itself, be based on something more than speculation, and constitute something more than conjecture. As the Court of Appeals

noted in *Garadebian v William Beaumont Hospital*, 208 Mich App 473, 476 (1995), and quoting *Skinner, supra*, 445 Mich, 165: "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, **or** the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (Emphasis added) In the case at bar, the circuit court correctly concluded that plaintiff's theory constituted nothing more than speculation and conjecture.

Secondly, it is not accurate to suggest, as plaintiff did, that expert Matthew Brach agreed that plaintiff's theory was the only possible one. Rather, a reading of his deposition makes clear that he was retained by defendant North Star Steel to consider *only* plaintiff's theory, and he had not considered, nor did he have the evidence, to opine on any other potential theory. And finally, it was not the defendants' burden to proffer theories; it is always the plaintiff's burden to proffer a theory that surpasses speculation and conjecture. As stated by the Michigan Supreme Court in *Grostic v Agco Corp*, 465 Mich 949 (2002): "As the dissenting judge in the Court of Appeals observed, however, the majority inverted the burden of proof by relying in part on an alleged lack of evidence to support the *defense* theory of causation. The majority should instead have confined its analysis to whether plaintiffs' evidence was sufficient."

A final case of note is *Stefan v White*, 76 Mich App 654 (1977), where the plaintiff slipped and fell in the defendant's home. Although her complaint alleged that she tripped on a protruding metal strip on the door sill, at her deposition plaintiff was unable to say

what had caused her to fall: She knew only that she had fallen. Notwithstanding the affidavit of plaintiff's husband who had found her and noted the defective metal strip, the Court held that summary judgment had properly been granted defendant:

> * * * The mere occurrence of plaintiff's fall is not enough to raise an inference of negligence on the part of defendant. As has been noted, plaintiff's husband did not see the fall. His affidavit points to one possible cause – the metal strip – but it presents no evidence linking that strip to the fall. Only conjecture can make this the causal element to the exclusion of all others. Such speculation or conjecture is insufficient to raise a genuine issue of material fact. * * *

As noted by plaintiff in her Appellant's brief, the *Stefan* court did set forth the circumstances where an inference of negligence would be allowed, and plaintiff sought to bring this case within this doctrine, commonly referred to as *res ipsa loquitur*. See, *e.g.*, discussion in *Wilson v Stilwill*, 411 Mich 587, 607 (1981), and *Hasselbach v TG Canton*, 209 Mich App 475, 479-480 (1995). The requisite factors for invoking this doctrine are, as stated in *Stefan*, 76 Mich App, 661:

> "1. The event must be of a kind which ordinarily does not occur in the absence of someone's negligence.
>
> 2. The event must have been caused by an agency or instrumentality within the exclusive control of the defendant.
>
> 3. The event must not have been due to any voluntary action or contribution on the part of the plaintiff.
>
> 4. Evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff." *Gadde v Michigan Consolidated Gas Co*, 377 Mich 117, 124; 139 NW2d 722, 726 (1966).

However, as in *Stefan*, consideration of the elements of *res ipsa loquitur* does not aid plaintiff. There is no evidence that this was an event which would not occur in the

absence of someone's negligence. In fact, common experience dictates otherwise, even if it were assumed that something was embedded in the tires. No matter how carefully one might inspect the tires, something could be missed. No matter how often someone checked the tires, something could be picked up after the inspection. Moreover, as the record of this case establishes, it is also possible that nothing was embedded in the tires, but that a truck kicked up something lying in the road. Nor can it be said that the causative agency or instrumentality was within the exclusive control of the defendant, because no one knows what that causative agency or instrumentality was. Nor, for that matter, is evidence of the "true explanation" more readily accessible to the defendant. Simply stated, plaintiff failed to sustain her burden, summary disposition was properly granted to defendants, and the Court of Appeals erred when it found to the contrary.

RELIEF REQUESTED

Defendants-Appellants, Marc Sevigny and J.R. Phillips Trucking, Ltd., respectfully request that this Court grant leave to appeal the December 7, 2004 ruling of the Michigan Court of Appeals insofar as that Court reversed the summary disposition granted to them by the circuit court.

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